1990

Deanna Foxley v. William N. Foxley : Brief in Opposition to Certiorari

Utah Supreme Court

Robert W. Hughes; attorney for respondent.
Greg S. Ericksen; attorney for petitioner.

BRIEF

IN THE SUPREME COURT

STATE OF UTAH

DEANNA FOXLEY, Plaintiff and Respondent, vs. WILLIAM N. FOXLEY, Defendant and Petitioner.	Case No. 900590

PLAINTIFF'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF CERTIORARI

GREG S. ERICKSEN
Attorney for Defendant
1065 South 500 West, Suite 1
P. O. Box 609
Bountiful, Utah 84011-0609
Telephone: (801) 295-6841

ROBERT W. HUGHES
Attorny for Plaintiff
1000 Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 363-1974

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1065 South 500 West, Suite 1
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Bountiful, Utah 84011-0609
Telephone: (801) 295-6841

ROBERT W. HUGHES
Attorny for Plaintiff
1000 Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 534-1074

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IN THE SUPREME COURT

STATE OF UTAH

DEANNA FOXLEY, Plaintiff and Respondent, vs. WILLIAM N. FOXLEY, Defendant and Petitioner.	Case No. 900590 Response to Defendant's Petition for Writ of Certiorari

COMES NOW the Plaintiff, Deanna Foxley, pursuant to Rule 50 of the Utah Rules of Appellate Procedure, and responds to the Petition for Writ of Certiorari filed by the Defendant, Dr. William N. Foxley as follows.

QUESTIONS PRESENTED FOR REVEIW

The questions presented for review are set forth in the Defendant's Petition for Writ of Certiorari and will not be repeated herein.

In addition to the questions stated in the Defendant's Petition, Plaintiff submits that one addition should be considered by this Court, that question is whether the issues raised by the Defendant are sufficiently important or special as to merit review by this Court. See Rule 46 of the Utah Rules of Appellate Procedure.

OPINIONS OF THE LOWER COURTS

The Defendant failed to attach to his Petition for Writ

of Certiorari, the Order of the Trial Court Modifying the Decree of the Divorce (Exhibit "A" hereto), the Order of the Court of Appeals denying the Defendant's motion for rehearing (Exhibit "B" hereto), and the Minute Entry, dated March 21, 1989, by the Trial Court, (Exhibit "C", hereto). Plaintiff asserts that these pleadings are necessary to this matter.

JURISDICTION

Plaintiff does not dispute the statement of jurisdiction contained in Defendant's Petition for Writ of Certiorari.

CONTROLLING AUTHORITY

The Plaintiff denies that Rule 801(a) and (b), 802, 803, and 902, of the Utah Rules of Evidence are applicable or controlling authority to this matter for the reasons set forth below.

The Plaintiff also asserts that Rule 46 of the Utah Rules of Civil Procedure is applicable to this matter. Rule 46 provides as follows:

> Considerations governing review of certiorari. Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons.

STATEMENT OF THE CASE

The Plaintiff does not dispute that the Statement of the Case as set forth in Defendant's Petition.

STATEMENT OF FACTS

The Plaintiff adopts the Statement of Facts contained in the Plaintiff's Petition, except as that Statement contains

unfounded speculation and legal conclusions. For example the Defendant states in this section of his Petition, "The Worksheet was submitted without foundation and without determining or deducting business expenses or insurance contributions." and "The statement (of attorney's fees) was submitted without foundation or testimony". Page 7 of Defendant's Petition.

ARGUMENT

I.

THIS COURT SHOULD DENY REVIEW OF THIS CASE.

Rule 46 of the Utah Rules of Appellate Procedure provides that review in this Court by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. In this case the issues of law used by the Defendant have been extensively reviewed in prior opinions by this Court and in the Court of Appeals. The decision in this case in not contrary to prior appellate rulings nor will review of this case facilitate a resolution of any prior inconsistent appellate opinions. The facts are unique to this case. Therefore, this case does not require review by this Court.

It is also pertinent to note that the issues raised by the Defendant have been argued on numerous occasions. This case was the subject of two days of trial and numerous post trial motions in the Trial Court. The decisions of the Trial Court were amply supported by the evidence presented at trial, the

applicable statutes, the rules of evidence and procedure and by prior opinions rendered by this Court and in the Court of Appeals. Thereafter, the Defendant filed an appeal with the Court of Appeals. In the Court of Appeals the issues, which are identical to the issues raised herein, were fully briefed and argued to the Court. The Court of Appeals affirmed the Trial Court's holding in its entirety, except the issue of attorney's fees was remanded to the Trial Court for a determination of the reasonableness of the fees awarded. After the Court of Appeals rendered its decision the Defendant moved that Court for a rehearing. The Motion for rehearing was granted by the Court of Appeals and again the same issues were briefed for the Court, and therefore the Court of Appeals denied the motion for rehearing. (See Exhibit "B".)

The issues raised by the Defendant have been fully addressed and properly decided in both of the lower courts. Moreover the issues raised are so insubstantial, accordingly, the Defendant's Petition should be denied by this Court.

II.

THE UTAH COURT OF APPEALS DID NOT ERR IN ITS RULING ON THE ISSUE OF ALIMONY.

The Defendant states that "there must be clear rationale for the level of alimony awarded to a party and that the court must consider three criteria in determining the level of alimony." The Defendant cites the cases of Jones v. Jones, 700 P2d 1072 (Utah 1985) and Rusham v. Rushsam, 742 P2d 123 (Utah

App. 1987).

In the present case both the Trial Court and the Court of Appeals rendered their respective decisions in compliance with the provisions of the above referenced cases. The Defendant, however, simply chooses to continue to ignore testimony and evidence presented at trial, the Finding of Facts entered by the Trial Court and the opinion on this issue by the Court of Appeals.

Clearly, the testimony and evidence presented to the Trial Court was sufficient for the Trial Court to adequately determine the respective incomes of the parties, to determine the financial condition and needs of the Plaintiff and to determine the financial ability of the Defendant to pay alimony. See the Amended Findings of Fact, attached as Exhibit "G" to Defendant's Petition, Nos. 13, 15, 16, 17, 18, 19, 20, 26, and 27.

It cannot be disputed that the amount of alimony is to be determined by the Trial Court based upon the criteria as set forth by the Supreme Court and then based upon the evidence and testimony presented at trial. Gill v. Gill, 718, P2d 779 (Utah 1986), Savage v. Savage, 658 P2d 85 (Utah 1983), Bushell v. Bushell, 649, P2d 85 (Utah 1982), Smith v. Smith, 751 P2d 1149 (Utah App. 1988).

In this case, Plaintiff petitioned the Trial Court for an increase in alimony. The Trial Court, after the presentation of the evidence and testimony, held that the Appellee had "a real and substantial need for an increase in alimony" and that it was

"just and equitable that the monthly alimony to be paid by the Defendant to the Plaintiff should be increased" (See Amended Findings of Fact, Nos. 27 and 28.)

On reveiw of this issue in this case the Court of Appeals held that the Trial Court's findings and conclusions demonstrated that the criteria of Jones, supra, had been considered. See Foxley v. Foxley, 801 P2d 155, 156 (Utah App. 1990).

The Court of Appeals further held in this case, where the Trial Court's findings and conclusions show that the court considered the material factors, the appellate court should accord considerable discretion to the Trial Court in determining the amount of alimony. (Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986)). The Court of Appeals concluded, "In light of these findings, the increases in alimony and child support are far from abuses of the trial court's discretion." Foxley, supra, at page 157.

The Defendant's allegation that the Trial Court and Court of Appeals failed to consider necessary criteria regarding alimony or that its opinion was contrary to the referenced case is without merit, and, as such, this question does not require review by this Court.

III.

THE OPINION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE UTAH RULES OF EVIDENCE

A. It is pertinent to note the following with regard

to the issue of the Child Support Worksheet submitted at the trial of this matter.

First, the Trial Court at no time made any reference concerning the use or lack of use of the Child Support Worksheet submitted by the Plaintiff.

On the issue of child support, the Trial Court was meticulous and deliberate in its review of the evidence and in making its findings concerning the award of child support.

The Trial Court held that at the time of the modification hearing the Defendant had an income in excess of $6,985.00 per month and that the Plaintiff had an income of $800.00 per month (see Amended Finding of Fact No. 22). The evidence which supported the Trial Court's findings concerning the Defendant's income included, but was not limited to the Appellant's 1984-1987 Federal Tax Returns, admitted as Trial Exhibits Nos. 4-7 and the Defendant's testimony where he admited he earned over $90,000.00 in the first 6 months of his practice of medicine, see the Trial Transcript, Volume 2, 106:3-12, and that he was able to invest $41,660.00 into a Keogh Retirement Plan in 1987, see the Trial Trial Transcript, Volume 2, 106:9-15 and Amended Finding of Fact No. 18.

Based upon the evidence the Trial Court held that the proportionate share of the parties combined income was 10% and 90% for the Plaintiff and the Defendant, respectively. See Amended Finding of Fact No. 23. The Trial Court then held, based upon the parties combined adjusted gross incomes, the amount of

child support to be paid by the Defendant should be $546.00 per month per child. See Amended Finding of Fact No. 24.

The Trial Court made its own independent findings concerning the amount of child support based upon the evidence and testimony at trial. The Trial Court did not, as the Defendant alludes, base its findings concerning child support on the worksheets submitted by either of the parties hereto. Therefore, this issue raised by the Plaintiff is without merit.

Second, the Defendant misrepresents the Trial Court. At page 10 of his Petition, Defendant states "the court stated that by law he was required to accept the Worksheet". The Trial Court held, at the place cited by the Defendant, "Well, I suppose under the rules, he (plaintiff's attorney) can file those guideline worksheets any time you (plaintiff's attorney) want to, so go ahead." See Exhibit "C" - Appendix of Defendant's Petition, pg. 112, lines 23-25.

Finally, the Defendant argues in his Petition that the Child Support Worksheet was hearsay pursuant to Rule 801 (a). 801 (b), 802 and 803, Utah Rules of Evidence. This allegation is ludicrous considering the facts and circumstances of this case and based upon the findings entered by the Trial Court.

In this case both the Plaintiff and the Defendant submitted worksheets for the Trial Court's review. These worksheets were illustrative of what each party believed the testimony and evidence demonstrated at trial. The Court, properly considered the evidence and testimony and the parties

respective worksheets and then entered its ruling in this matter. See the Minute Entry of the Court, attached hereto as Exhibit "C".

The Court of Appeals held on this issue, where the Trial Court's findings and conclusions show that the Court considered the material factors, the judgment of the Trial Court should be accorded considerable discretion on the issue of child support. Foxley, supra, 156.

The decision by the Court of Appeals was proper and is not in conflict with the Rules of Evidence and, accordingly, the Defendant's argument on this issue is without merit.

IV.

THE COURT OF APPEALS DID NOT ERR IN FAILING TO REVERSE THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES

At the trial of this matter, prior to the parties closing statements, the issue of attorney fees was raised by Plaintiff's attorney. Thereafter the following discussion took place between the Plaintiff's attorney, Mr. Hughes, the Defendant's attorney, Mr. Ericksen, and the Court.

> Mr. Hughes: . . .Also, there were my attorney's fees, and I would like to put that in the record.
>
> The Court: You may.
>
> Mr. Hughes: Just as a matter of proffer. Do you want me sworn in?
>
> Mr. Ericksen: I object to that.
>
> Mr. Hughes: Why would you object?

Mr. Ericksen: Your case is closed.

Mr. Hughes: You and I (the parties respective attorneys) agreed we would put on my attorney's fees, in chambers this morning. That would be the last thing we did. I said I would do it by proffer.

Mr. Ericksen: I said I'd have no objections if you did it during your case.

Mr. Hughes: Move to proffer my attorney's fees, your Honor.

The Court: You may go ahead.

See the Plaintiff's Petition, Exhibit "D", which is an excerpt from the Trial Transcript, pages 113-114.

It is clear that the parties agreed to have the matter of attorney's fees addressed at the conclusion of trial and that the issue could be handled by proffer. The Trial Court accordingly, accepted the Plaintiff's proffer on the issue of attorney's fees.

The record and the Amended Findings of Fact of this case are replete with evidence, testimony and references to support the Plaintiff's need for assistance with the attorney's fees she incurred in bringing this matter to a hearing. (See Amended Finding of Facts, Nos. 10, 13, 22 and 26.) In addition, the Trial Court found, in Amended Finding of Fact, No. 30, "attorney's fees should be awarded to the Plaintiff in this case and that a reasonable attorney's fees would be the sum of $4,394.00 plus her costs incurred herein." In Amended Finding Fact, No. 31, the Trial Court held "Plaintiff's Counsel's fees were charged at the rate of $60.00 per hour, and considering the length of time expended and the complexities of the issues, the

award of attorney's fees is reasonable."

The Court of Appeals, however, held that there was no admissible evidence in the record to substantiate the issue of the reasonableness of the amount of attorney's fees awarded by the Trial Court and that an evidentiary basis for the fees would be required to established reasonableness of the fees. See Haumont v. Haumont, 793 P2d 421, 425, (Utah App. 1990) and Porco v. Porco, 752 P2d 365, 386, (Utah App. 1988). The Appellant Court, based upon the above, reversed the award of attorney fees and costs and remanded this issue for a determination of the amount to the Trial Court.

The Court of Appeals decision on this matter, considering the facts and circumstances of this case, is not contrary to prior Utah Court Appellant decisions, is supported by the facts of this case, and therefore review of this issue is not required by this Court.

V.

THE UTAH COURT OF APPEALS DID NOT ERR IN FAILING TO REMAND THE CASE TO THE TRIAL COURT FOR A NEW TRIAL.

The Defendant argued in the Court of Appeals that he was entiled to a new trial based upon certain new evidence claimed to have come to light after the hearing for modification and also because the Trial Court erred since the Defendant was not allowed "a fundamental evidentiary hearing on the issue of the new evidence." (See Defendant's Petition for Rehearing filed in the Court of Appeals, page 6.)

The broad discretionary power of the Trial Court in the granting or denying of new trial is well established. Page v. Utah Home Fire Ins. Co., 391 P2d 290 (Utah 1964); Haslam v. Paulsen, 389 P2d 736 (Utah 1964). Furthermore, a ruling on a motion for a new trial will not be disturbed on appeal except when there is a clear abuse of the Trial Court's discretion. Jensen v. Thomas, 570 P2d 574 (Utah 1962); Lembach v. Cox, 639 P2d 99 (Utah 1981).

With regard to the right to have an evidentiary hearing the Defendant cites no authority to substantiate that such a hearing was necessary. Despite the lack of authority, it is pertinent to review the procedural background of this matter.

The Defendant filed a motion and memorandum for a new trial, with supporting affidavits, with the Trial Court. The Plaintiff responded to the Appellant's motion, memorandum and affidavits.

Rule 4-501 (8) of the Code of Judicial Administration provides that motion may be decided by the Court without a hearing. Notwithstanding the above cited Rule, the Trial Court granted the Defendant oral argument on his motion. At the conclusion of the oral arguments the Trial Court held that the Defendant was not entitled to a new trial.

The Court of Appeals held with regard to the issue of granting a new trial as follows:

> For newly discovered evidence to warrant a new trial, the evidence must have a probative weight sufficient to have a probable effect on the result. Gregerson v.

Jensen, 617 P2d 369, 372 (Utah 1980) see also Doty v. Town of Cedar Hills, 656 P2d 993, 995 (Utah 1982). The evidence Mr. Foxley proffers does not have that degree of probative value, and the trial court thus did not abuse its discretion in denying his motion for a new trial. See Anderson v. Toone, 671 P2d 170, 173 (Utah 1983); Chournos v. D'Agnillo, 642 P2d 710, 713, (Utah 1982).

Accordingly, Defendant's Petition to have this issue reviewed by this Court should be denied.

CONCLUSION

Since the Defendant filed his appeal which is the subject of his Petition for Writ of Certiorari he has filed a second appeal with the Court of Appeals concerning the enforcement of the provisions of the modified decree of divorce (Case No. 900493). Furthermore, the Plaintiff has been required to bring several actions into the Trial Court in an attempt to have the Defendant comply with the terms of the modified decree of divorce.

Plaintiff submits that the Defendant's Petition for Writ of Certiorari with this Court is without merit and was filed in bad faith with the sole purpose to avoid his obligations, to avoid compliance with the provisions of the modified decree of divorce and to harass the Plaintiff by exacting the greatest emotional and financial trauma upon her which he is able.

The Defendant's Petition should be dismissed and the Plaintiff should be granted sanctions, including double costs and

attorney fees, as provided by Rules 33 and 40 (b) Utah Rules of Appellate Procedure.

DATED this 31st day of January, 1991.

Robert W. Hughes
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 31st day of January, 1991, a true and correct copy of the foregoing was mailed, postage prepaid, to Greg S. Ericksen, 1065 South 500 West, Bountiful, Utah 84101.

Robert W. Hughes

Robert W. Hughes (1577)
Attorney for Plaintiff
1000 Valley Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: (801) 534-1074

APR 1 [illegible] 1989
SALT LAKE COUNTY
By Kathy Grotepas
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY,	:	
	:	MODIFICATION OF DECREE
Plaintiff,	:	OF DIVORCE AND JUDGMENT
	:	
vs.	:	
	:	
WILLIAM M. FOXLEY,	:	Civil No: D82-1591
	:	
Defendant.	:	Judge Richard H. Moffat

181 10th

The above entitled matter having come on regularly for hearing before the Court, based upon the plaintiffs petition to modify the decree of divorce. The plaintiff was present at the hearing and represented by counsel, Robert W. Hughes. The defendant was also present at the hearing and represented by counsel, Greg S. Ericksen.

The Court having received testimony and admitted evidence, argument to the court having been made and the Court being fully advised on the premises and based upon the Findings of Fact and Conclusions of Law previously entered herein,

HEREBY ORDERS, ADJUDGES AND DECREES:

1. The Decree of Divorce should be modified as follows. Paragraph 3 of the orginal Decree of Divorce states:

> "3. That the defendant is Ordered to pay the plaintiff child support in the sum of $150.00 per month, per child, $600.00 in the aggregrate through the Clerk of the Court, until the minor children reach the age of majority."

This paragraph of the orginal Decree of Divorce is hereby as follows:

"3. That the defendant is hereby Ordered to pay the plaintiff child support in the sum of $1,547.00 per month. The amount of child support payable from the defendant to the plaintiff shall be increased to the sum of $1,638.00 per month, which represents $546.00 per month per minor child, beginning April 15, 1989.

(2) Paragraph 4 of the original Decree of Divorce states:

> "4. That the plaintiff has an interest in the defendants medical degree, and is awarded the sum of $10.00 per month as alimony, and that at such time as there has been a material change in circumstance of the parties, the issue of child support and/or alimony may be reviewed."

This paragraph of the original decree of divorce is hereby modified as follows:

"4. That the defendant shall pay to the plaintiff the sum of $1,350.00 per month as and for alimony until further Order of this Court.

(3) Paragraph 9 of the original Decree of Divorce states:

> "9. That both parties are Order to obtain and maintain health and accident insurance for the benefit of the minor children of the parties if such insurance is available through his or her employment."

This paragraph of the orginal decree of divorce is hereby modified as follows:

9. That the defendant shall provide health and dental insurance for the minor children of the parties and is hereby specifically Ordered to do so. Any medical or dental expenses, including orthodonic expenses not paid by health insurance shall be divided equally between the parties.

(4) The Decree of Divorce shall also be modified to include the following:

During any given period in which the defendant shall have extended visitation with the minor child(ren) of 25 consecutive days or more, the amount of child support the defendant is required to pay to the plaintiff shall decrease by 25% during the period of extended visitation.

(5) The plaintiff is awarded judgment in the amount of $4,394.00 against the defendant as and for attorneys' fees and costs which the plaintiff has incurred in this matter.

Dated this 19 day of April, 1989.

BY THE COURT:

RICHARD H. MOFFAT
DISTRICT COURT JUDGE

1-FOX-J1

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on this 7 day of April, 1989, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW and MODIFICATION OF DECREE OF DIVORCE AND JUDGMENT was hand-delivered to Greg S. Ericksen, 1065 South 500 West, Bountiful, Utah 84010.

Robert W. Hughes

IN THE UTAH COURT OF APPEALS

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Deanna Foxley, Plaintiff and Appellee, v. William M. Foxley, Defendant and Appellant.	ORDER DENYING PETITION FOR REHEARING Case No. 890493-CA

Before Judges Jackson, Garff, and Newey.

THIS MATTER having come before the Court upon Appellee's Petition for Rehearing, filed October 26, 1990,

IT IS HEREBY ORDERED that the Appellee's Petition for Rehearing is denied.

Dated this 30th day of November, 1990.

FOR THE COURT

Mary T. Noonan, Clerk

MAR 2 1 1989

SALT LAKE COUNTY
By K Gustafson
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DEANNA FOXLEY	:	MINUTE ENTRY
	:	Civil No. 824901591
Plaintiff,	:	
vs.	:	
WILLIAM M. FOXLEY,	:	
Defendant.	:	

The above entitled matter having come on regularly for hearing before the Court based on the plaintiff's Petition to Modify the Decree of Divorce to seek an increase in alimony and child support, and testimony having been taken and evidence admitted, argument to the Court having been made, and the Court being fully advised in the premises makes this its

DECISION

The Court finds that a substantial change of circumstance has occured in that the defendant's income has increased since the date of divorce from virtually nothing or approximately $50 per month to a figure which is not completely clear but which can be

EXHIBIT C

interpreted as being as high as $224,000 a year and certainly under no circumstances less than approximately $120,000 per year. The Court further finds that the plaintiff has done an admirable job of caring for herself and the children under very adverse circumstances and in educating and raising said children. She also has been struggling to obtain her own education to aid in the support of the children. The Court finds that the sum of $1,547 per month is the correct amount for child support and the sum of $1,350 per month is fair and equitable as alimony. The Court further finds that the defendant should be required to provide health and dental insurance for the minor children of the parties and he is hereby ordered to do so.

The Court does not find it necessary to invoke the recently declared novel theory of "equitable restitution" as enunciated by the Utah Court of Appeals nor is it necessary to invoke the provisions of the divorce decree wherein Judge Condor awarded an interest in the defendant's medical degree to the plaintiff. The Court finds that the change of circumstances above set forth are sufficient to justify the award herein without further findings regarding the questions relating to the defendant's medical degree. Court finds that attorney's fees should be awarded to the plaintiff in this case and that a reasonable attorney's fee is as set forth in the affidavits provided by plaintiff's attorneys in the sum of $4,394 plus her costs incurred herein. Plaintiff's

attorney will draft appropriate Findings of Fact and Conclusions of Law and amended decree to implement this decision.

Dated this 21st day of March, 1989.

Richard H. Moffat
District Court Judge